No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

——— Term, 194—

ABRAM W. FOURNACE,

Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the Emergency Court of Appeals (Fournace v. Bowles) is stated in the record (R. p. —) and reported in 148 Fed. (2d) 97.

II

STATEMENT AS TO JURISDICTION

This Court has jurisdiction under Title 50, U. S. C. A. Appendix, Section 924 (d). The applicable part of that section reads as follows:

> "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States,

> and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, Title 28, sec. 347)."

The case was brought pursuant to Title 50, U. S. C. A. Appendix, Section 924 (c) (1), in United States Emergency Court of Appeals on a "Complaint As To Regulations Nos. 139, 294 and 372." The Regulations had been adopted and issued by the Price Administrator pursuant to the powers conferred upon him under the Emergency Price Control Act of 1942. The pertinent part of the statute is found in 50 U. S. C. A. Appendix, Section 902 (a), and reads as follows:

> "Whenever in the judgment of the Price Administrator (provided for in section 201) (Section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix), he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix)."

See pages 10 and 11, post, for ceiling prices involved.

Judgment was entered on March 17, 1945. An order amending it was entered on March 23, 1945. A petition for rehearing was filed on or about March 25, 1945, and the order denying that petition was entered April 17, 1945.

The Petitioner was engaged in the retail used furniture and household appliance business. On July 26, 1944, he was convicted on twelve counts of an indictment filed June 22, 1944, in the United States District Court for the

Southern District of Indiana, Indianapolis Division. The twelve counts were based upon:

(a) Eight sales of used refrigerators;

(b) One sale of a used vacuum cleaner; and

(c) Three sales of used washing machines,—

all of which sales the indictment charged were above the ceiling prices fixed respectively by Maximum Price Regulations Nos. 139, 294, and 372. A judgment was entered against the petitioner on August 19, 1944, the sentence being a fine of $1,000.00 and imprisonment in the Marion County Jail for nine months.

The Petitioner, within five days of the date of the judgment entry, filed his petition in the United States District Court for leave to file a complaint against the Price Administrator in the Emergency Court of Appeals, objecting to the validity of the Regulations. For copy of the petition see Record page —. The District Court granted the petition. For copy of the order granting it see Record page —. On September 18, 1944, the Petitioner mailed to the Clerk of the Emergency Court of Appeals his "Complaint as to Regulations Nos. 139, 294 and 372." For copy of the complaint see Record page —.

For statute giving the right to proceed in the manner herein set forth see Title 50 U. S. C. A. Appendix, Section 294 (e) (1).

The Respondent filed his answer to the complaint on October 26, 1944, and in his answer prayed that the complaint be dismissed. On November 18, 1944, the Petitioner mailed to the Clerk of the Emergency Court of Appeals his "Application For Leave to Introduce Evidence under Section 204 (e)." On December 6, 1944, the Respondent filed his "Objections to Application for Leave to Introduce

Evidence Including Motions to Dismiss Complaint or to Strike Portions Thereof."

The Emergency Court of Appeals heard arguments on the pleadings, and on March 15, 1945, decided the case with a written opinion and entered a judgment dismissing the complaint. On March 23, 1945, the Emergency Court of Appeals entered an order amending the opinion. For the opinion of the Emergency Court of Appeals see Record page —.

On March 23, 1945, the Petitioner mailed his Petition for Rehearing. On April 4, 1945, the Defendant filed his answer to the petition for rehearing; and on April 17, 1945, the Emergency Court of Appeals entered its order denying the petition for rehearing.

The effective dates of the regulations and the specific articles involved under each one challenged in this case are as follows:

Maximum Price Regulation No. 139 effective March 24, 1943, which fixed the prices for used mechanical refrigerators, including the price of:

(1) a used Gibson refrigerator, Model CDU 630, Serial No. 830368, at $90.96. (Sold for $225.)

(2) a used Frigidaire, Special 5-39, Serial No. SOB-3534-C-11-R-42, at $96.00. (Sold for $215.)

(3) a used refrigerator known as a Coldspot, Model 1942, at $123.96. (Sold for $195.00.)

(4) a used 1941 Stewart Warner refrigerator, Model 671, Serial No. 623527, at $160.65. (Sold for $275.)

(5) a used mechanical refrigerator known as a Frigidaire, 1941 Model 6, at $115.15. (Sold for $325.)

(6) a used mechanical refrigerator known as Coldspot, Model 106-39961, at $84.00. (Sold for $225.)

(7) a mechanical refrigerator known as Coldspot, Model 606, Serial No. M80733, at $81.00. (Sold for $225.)

(8) a used mechanical refrigerator described as follows: 5 foot 1933 General Electric, at $64.50. (Sold for $265.)

Maximum Price Regulation No. 294 effective January 7, 1943, which fixed the prices of used vacuum cleaners, including the price of a used Hoover Model 541, Serial No. 5568203, at $22.00. (Sold for $55.)

Maximum Price Regulation No. 372, effective May 3, 1943, which fixed the prices of used washing machines, including the price of:

(1) a used washing machine known as Voss, Model K. N. E., Serial No. 501743, at $43.25. (Sold for $110.)

(2) a used washing machine known as Speed Queen, Model B, Serial No. 840626, at $63.96. (Sold for $110.)

(3) a used washing machine known as Norge, Model W400 (3274-70), at $57.50. (Sold for $135.).

This is the first case, we believe, in which the validity of these Regulations is presented to this Court for decision. If the Regulations are valid, then the sentence upon the Petitioner would become effective. There was no opportunity to test the validity of these Regulations in the Trial Court. The first place in which their validity could be challenged was in the Emergency Court of Appeals. The applicable part of the controlling statute reads as follows:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have ex-

> clusive jurisdiction to determine the validity of any regulation or order issued under section 2 (section 902 of this Appendix), of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision."

The questions as to the validity of the Regulations were properly presented under the above proceedings. We have been unable to find any case directly in point where this Court has made a decision on a complaint filed by one who had been convicted in the Criminal Court, and then sought to question the validity of the Regulations on which his conviction rested. But the language of the Emergency Price Control Act supports our position and demonstrates that the case is within the jurisdictional provisions relied on.

The case is of importance to all who are engaged in the used furniture and household appliance business. Such business is generally carried on as a retail business. The decision with respect to these particular Regulations will constitute a governing precedent with respect to that entire business throughout the whole country. That, we believe, makes it of sufficient public importance to justify the granting by this Court of a writ of certiorari to review the decision of the Emergency Court of Appeals.

OPA Regulations are a subject of acute interest and are likely to continue to grow in interest. The general public is likely to regard the urgency of war regulations as less justifiable under conditions that will follow the ending of the war in Europe. The clarification of any questions regarding rules and regulations is therefore a matter of general public importance. The reasonableness and equity of the rules and regulations will commend them to general observance by the public, whereas if the rules are not just and equitable but are unreasonable, a lack of public respect for them would be inevitable, and that would increase the difficulties in the administration of this very necessary but very difficult function of the government during the emergency caused by the war, which may not end exactly with the ending of the war. The rules and regulations should therefore be scrutinized by the court for the purpose of pointing out their reasonableness, fairness and equity, where they are reasonable, fair and equitable; or where they lack such qualities the scrutiny of the courts is necessary to have those defects pointed out so that they may be corrected. By these means the public approval necessary to the successful administration of OPA may be developed and strengthened.

Thus from a consideration of the public interest this case is of importance.

III

STATEMENT OF THE CASE

The Statement as to Jurisdiction is adopted here as being also a part of the Statement of the Case.

Since the case was disposed of on the motion to dismiss, the averments of the complaint are taken as true. The rest of the statement of the case, so far as the original

hearing is concerned, therefore consists of that part of the complaint containing matters not already set forth in the preceding parts of this brief. For that remaining part of the Statement of the Case pertaining to the original hearing see Record pages — to —.

For the part of the Statement of the Case which pertains to the questions arising on the petition for leave to introduce evidence and the petition for rehearing, see Record pages — and — respectively.

The alleged errors pointed out in the petition for rehearing are stated above under errors intended to be urged as Nos. 1, 2 and 3. The additional alleged errors Nos. 4 and 5 pertain to action of the Court involving the case as a whole, on the basis of the result reached rather than on the basis of the matters contained in the opinion.

IV

ERRORS INTENDED TO BE URGED

The Petitioner intends to urge the following errors in the opinion and decision of the Emergency Court of Appeals, and states that it is believed that the said Court erred in its opinion and decision in the following particulars:

1. In holding by inference and implication that in order to support the burden resting upon the complainant to establish that regulations are not generally fair and equitable, the complainant must offer evidence showing the effect of the regulations on complainant's operations as compared with the results in some representative period before price control.

2. In holding that under the burden that rests upon the claimant to establish a prima facie case he must present

"his own data (as to his costs and earnings) and proving that his operations are substantially representative of the industry and are not in its high cost marginal fringe."

3. In holding that the evidence offered in support of the point that the regulations involved in the case are not generally fair and equitable, is not sufficient.

4. The Emergency Court of Appeals, it is believed, erred in dismissing the complaint.

5. It is believed the Emergency Court of Appeals erred in failing to grant to the Petitioner the opportunity to amend his application for leave to introduce evidence under Section 204 (e), Rule 18 (a).

V

ARGUMENT

While there are three regulations involved, the comments made in this argument on any of them applies with equal effect to all of them. They are therefore not taken up for separate treatment.

The errors we believe were committed by the Emergency Court of Appeals will be argued in the order in which they are stated under "Errors Intended To Be Urged."

1

On the first alleged error intended to be urged—that the Court erred in holding by inference and implication that in order to support the burden resting upon the complainant to establish that regulations are not generally fair and equitable, the complainant must offer evidence showing the effect of the regulations on complainant's

operations as compared with the results in some representative period before price control.

The third and last main ground of objection raised by the complainant is that the regulations are not generally fair and equitable. It is asserted in paragraphs 4, 5 and 6 of section V of the complaint that the prices established do not allow for recovery of costs of repairing and materials used; that costs of material, labor and transportation have more than doubled since the date used as a basis for the maximum prices; that the effect of this was to destroy the entire business of dealing in the used articles; and that as a result of the prohibition in the regulation against tie-in sales, the cost of doing business was increased because combination selling is necessary in the used furniture business to keep down overhead.

The evidence offered in support of these allegations is insufficient to meet the burden which rests upon the complainant to establish that the regulations are not generally fair and equitable. No offer is made of evidence showing the effect of the regulations on complainant's operations as compared with the results in some representative period before price control. It is settled that a showing of increased costs alone is insufficient. At the very least complainant would be required, in order to establish a prima facie case under the burden of proof which rests upon him to present "his own data (as to his costs and earnings) and proving that his operations are substantially representative of the industry and are not in its high cost marginal fringe."

Paragraphs 4, 5 and 6 of Section V of the complaint read as follows:

"The regulation in ignoring the actual present value of such appliances and in fixing stationary and inflexible

ceiling prices resulted in confiscation of property in such appliances, in many instances, through the fact that the cost of the labor, repair materials, and replacement parts, was uncontrolled and unregulated, from which it followed that it was usually impossible to sell such appliances at or below ceiling prices without selling below the actual cost of obtaining them and putting them into usable condition.

"(I) The cost of labor was regulated only where there were more than eight persons employed. Repair materials and replacement parts to a certain extent came within the price regulations, a fact which was overlooked in the statement of this objection. But the Regulations were applicable and could be enforced only in a limited way. Where units were not supplied by the factory but had to be obtained wherever they could be found, as a practical matter there were no established prices.

"In the operation of a used furniture business it is necessary to keep down the overhead, and to accomplish that result dealers must sell merchandise in as large quantities as possible, although they are selling to retail purchasers. To accomplish this they must and do sell combinations or suites, of articles. But this method of distribution of used furniture was made impossible by the OPA regulations which required a dealer who offered a commodity with a ceiling price in combination with other articles to sell the article having the ceiling price to a customer whenever the customer insisted on purchasing only that one article, or that one article and others constituting less than the entire combination, or suite, that had been offered. As a result of this regulation suites, or combinations, would be broken up through the purchase of only the one article and thereby the cost of doing busi-

ness would be greatly increased—which was contrary to the purpose of the Emergency Price Control Act of 1942 and the acts supplemental and amendatory thereto.

"Labor, transportation and other costs have generally more than doubled since the date in relation to which ceiling prices were established on used articles, and yet the used articles were held at the same percentage of that base price, which produced a condition that would utterly destroy the entire business of dealing in used articles."

The offers of proof in support of paragraphs 4, 5 and 6 of Section V just quoted, read as follows:

"Referring to complaint, page 15, item (I) and page 17, item 4 (denied in answer, page 9), the complainant offers to prove by his own testimony and the testimony of his employees and others engaged in the same business that the cost of labor, raw materials and replacement parts in practical effect was uncontrolled and unregulated; that wages for labor of this kind were the wages of those whose employers employed eight or less, and therefore were not under any wage control; that repair and replacement materials and parts were often obtained from the dismantling of other such appliances, in whole or in part, which process would make the dismantled appliances of no value and yet cause the repair and replacement parts used in the appliances to be reconditioned, in effect, cost what it cost to obtain the appliance for such dismantling; and that it was impossible to obtain parts and materials from regular dealers on the prices fixed by the price regulations.

"This evidence, if admitted, would show in effect that the property value in the appliances would be destroyed through the operation of such regulations where as a result thereof the appliances could not be put into usable condition and then sold at a price at least high enough

to cover the cost of the acquisition of the original appliances and the conditioning of them for use—which would amount to confiscation, for such appliances under such conditions would have no property value.

"The complainant offers to prove in relation to item 5, on page 18 of his complaint, which is denied under item (e), page 9 of respondent's printed answer, by his own oral testimony and the testimony of his employees and other dealers in used equipment that the used equipment business operates on a narrow margin of profit; that the dealers must handle combinations of articles to reduce the cost of the overhead in relation to the amount of business done in order to stay in business; that the sale of single articles is more expensive than the sale of articles in combination; and that to economize both on time and on the price to be charged the purchaser it is necessary to sell commodities of the kind involved in combination.

"This evidence, if admitted, would show that the regulation which prevents the selling in combinations was contrary to the purpose of the Emergency Price Control Act and operated to deprive the complainant of his property without due process of law.

"The complainant offers to prove by his own testimony and the testimony of his employees and of others engaged in like business what the prices of labor were before the date on which the ceiling prices were established and what they have been since that date; what the costs of the kind of transportation the complainant used were before said date and what they have been since said date; and what other items of cost in his business were before the said date and what they have been since said date; and that such costs have generally more than doubled, within the time stated, in the place in which the complain-

ant has been engaged in business; and that all such costs have risen to where if these used articles are held to be the same percentage of the base prices as is used in the price regulations, the resulting condition would be to destroy the business of dealing in such used articles in the locality in which the complainant operates."

If such a rule were established it would preclude the complainant who operated on a small scale and did not keep a complete and accurate set of records of his business, as were the facts in the complainant's case, from any possibility of proving that the regulations were not generally fair and equitable—even though the fact of the regulations being generally unfair and inequitable might be clearly established upon other evidence.

There is nothing in the rules to indicate that any specific type of evidence must be offered in order to establish the unfairness and inequity of any rules or regulations. The litigant should not be required on his peril to anticipate some particular proof, or method of proof, that might be required to be included in his offers without some guidance by the rules of the court, or otherwise, as to what specific evidentiary facts might be regarded as vital and essential, when the proof of the ultimate fact might be made even in the absence of certain evidentiary facts which might be pertinent to the proof but not absolutely necessary.

In the case of Philadelphia Coke Co. v. Bowles, 139 Fed. (2d) 349, it was held that increased cost alone is insufficient to establish the unreasonableness of a regulation.

However, the same case holds that, "If a regulation of the price administrator fixing the maximum price to be charged by the sellers of a commodity, in its application to a major portion of the industry, is unfair or inequitable,

it does not meet the requirements of the Emergency Price Control Act of 1942, but the act does not require that a regulation shall protect each individual member of the industry in the enjoyment of his customary profits," citing U. S. Gipsom Co. v. Brown (1943), 137 Fed. (2d) 803.

It will be kept in mind that it is stated in the act that its purpose is, not only to protect consumers from inflationary increases, but also to afford similar protection "to persons engaged in business."

In the above case the court holds that the question is whether the General Maximum Price Regulation, as applied to the sale of complainant's coke oven gas, complied with the requirement of the Act that it shall be generally fair and equitable, or whether its application to the sale of their product is arbitrary and unreasonable and therefore, invalid.

The court says: "The act very properly lays down certain standards to which maximum price regulations shall conform. One of these is that a regulation shall be generally fair and equitable in its application to the sellers of a particular commodity. If the application to a major portion of the industry is unfair or inequitable it does not meet this standard." U. S. Gipsom Co. v. Brown, Supra.

The Act directs the Administrator to take account of all relevant factors which he finds to be of general applicability, including general increases or decreases in costs of production, distribution and transportation and "general increases or decreases in profits earned by sellers of the commodity." Sec. 2 (A).

The court held the administrator must act in the light of all relevant factors. He cannot rely upon one while ignoring others equally relevant. (Chalter v. Brown, Em.

A. (1943), 136 Fed. (2d) 490; Spaeth v. Brown, Em. A. (1943), 137 Fed. (2d) 669.

It is the contention of the complainant in the case at bar that the regulations absolutely wipe out his margin of profit in dealing in the appliances mentioned in this case. His proof would be that this would result to a major part of home appliance dealers.

The court in the case of Philadelphia Coke Co. v. Bowles, Supra, expressly holds that such a regulation would be invalid.

It was decided in that case that the regulation there involved did not prevent the complainant from realizing a reasonable profit upon his operations. The court says: "The present complainants have stated expressly that they do not base their complaints upon the ground that the application of the G. M. P. Regulations in the sale of coke oven gas has prevented the independent producers from realizing a reasonable profit.

"If such were the case a different situation would be presented which might afford valid grounds for contesting the application of the regulation to the complainants."

The court further says: "If after the issuance of a regulation a general industry-wide increase in the costs of production and transportation should take place which results in an unreasonable decrease or in a complete wiping out of the profits realized by the industry, that fact would doubtless afford new grounds for protest of the regulation."

It would seem that the decisive test as to the unreasonableness of these regulations would be in finding that no profit at all could be realized by dealers who buy such articles for re-sale. If the complainant's proof would

establish that a used goods dealer could not buy under ceiling prices and therefore no profit was possible if he sold at ceiling prices, then not only would complainant's request for permission to introduce evidence be well taken, but such proof would, standing alone, brand the regulation as invalid.

The administrator should consider the available margin of profit of dealers in any business or industry.

Gillespie-Rogers-Pyatt Co. v. Bowles, 144 Fed. (2d) 361.

2

On the second alleged error intended to be urged—that the Court erred in holding that under the burden that rests upon the claimant to establish a prima facie case he must present "his own data (as to his costs and earnings) and proving that his operations are substantially representative of the industry and are not in its high cost marginal fringe."

The parts quoted from the opinion, the complaint, and the petition for leave to introduce evidence, under the first alleged error should also be considered in connection with this alleged error.

This holding apparently makes it mandatory upon one in making his offer of proof to set out the particular data referred to. Again, if the litigant failed to anticipate the necessity of that particular data, according to the apparent meaning of the opinion, he could not make good his case, no matter what other offers of proof he might make. The fact that the regulations are not generally fair and equitable might be open to proof without the offering of the data concerning his own operation. In fact it is submitted that the opinion might be regarded

as somewhat inconsistent in holding that the test is not what his own individual experience might be, but that the true test is the general effect on the industry—and then requiring the complainant to give "his own data" on these matters. The opinion states "that the comparison of isolated cases is, however, of little significance. It is the general effect of operations under the regulations which determines their general fairness and equity." It seems inconsistent in view of that statement and in the absence of any specific rule requiring it, that the complainant would have to include an offer to prove such data and that a failure to include it would be fatal to his cause. Yet such is the inference, it is believed, that would have to be drawn from the opinion.

3

On the third alleged error intended to be urged—that the Court erred in holding that the evidence offered in support of the point that the regulations involved in the case are not generally fair and equitable, is not sufficient.

The averments of the complaint, which are taken as true, to the effect that the regulations are not generally fair and equitable, are condensed in a correct summary of them in the first paragraph above quoted from the opinion. Without any offer of evidence these facts should be accepted as true in passing on the motion to dismiss. The offer of evidence does not weaken the averments to the extent that the proof offered itself shows the facts to be otherwise. The proof itself might not be sufficient to satisfy the court as to the truth of the alleged facts. But in that event the motion to dismiss should have been sustained, but the court should have pointed out the deficiencies in the proof and given opportunity to the litigant

to supplement the offer if evidence is available to cover the points which the court holds is lacking.

4

On the fourth alleged error intended to be urged—that the Court erred in dismissing the complaint.

On a motion to dismiss a complaint the facts alleged in the complaint are assumed to be true.

Brown v. Quinlan, Inc., 138 Fed. (2d) 228.

"A regulation made by an officer of the government, the violation of which subjects the violator to criminal sanctions, must be strictly construed." U. S. v. Seigel Bros., D. C. Wash. (1943), 52 Fed. Supp. 238.

That principle should apply even though there is a petition for leave to introduce evidence. The petition for leave to introduce evidence should properly include all the evidence the petitioner considers necessary to establish the facts with respect to which he seeks to introduce evidence.

Rule 18 (a) of the Emergency Court of Appeals provides for the application for leave to introduce evidence. It reads in part as follows:

"Such application shall contain an offer of proof with respect to the evidence sought to be introduced, setting forth the character and form of such evidence and a summary of what such evidence would show if admitted. Within five days after service of an application for leave to introduce evidence the other party may file objections thereto, which may include an admission in whole or in part of the truth of any of the evidence offered in the application and a motion to dismiss the complaint or for judgment on the pleadings on the ground that the evi-

dence offered, even if true, would be insufficient to establish a right to relief or an affirmative defense, as the case may be."

That rule should not be construed to mean: that on a motion to dismiss the complaint, there should be no opportunity given to amend a petition for leave to introduce evidence if the court concludes that the evidence offered would be insufficient in its opinion to establish the right to relief. If such a construction were made then it would lead to undue prolixity in the applications filed under that rule. The petitioner would be impelled by such a construction to offer everything that could conceivably be regarded as evidence, including evidence even on matters within the judicial knowledge of the court or on points that the petitioner might regard irrelevant but which he would fear to omit because of the peril that the court might not regard them as irrelevant.

If this case stands as a guiding precedent, then the applicant would be confronted with the necessity of anticipating everything that the court might decide should have been included in the proof. The fact that the offer of proof failed to include matters which the court held material, but which the applicant omitted as immaterial, would result in an unjustifiable disadvantage to the applicant—especially where the proof was available but had been omitted from the offer because of being regarded as immaterial or unnecessary. The procedure that should develop should be such as to put upon the Emergency Court of Appeals the duty of pointing out wherein the offer of proof was deficient and giving to the applicant the opportunity to amend the offer if the evidence is available upon which to base the amendment.

This suggested procedure would not be burdensome. If the complaint itself did not state sufficient facts then it could be dismissed because of insufficiency of facts to constitute a cause of action. But that would not need to draw into consideration the offers of proof. The acceptance of the facts as alleged would make unnecessary the consideration of any offers of proof.

But where there were controverted facts, the offers of proof would appropriately be considered; and if they were such as could not be sufficient to establish the facts in issue even if the proof were uncontroverted, then the essentials which were lacking, according to the opinion and judgment of the court, could be pointed out, so that if the proof actually existed and could be produced the application could be amended to include it—otherwise the case would be terminated without a sufficient opportunity of the applicant to get his case before the court. Whether he would succeed or not might often be determined by the success with which his attorneys would be able to surmise the mental processes of the court.

What has been said thus far under this alleged error pertains rather to procedural problems than to the merits of the case. And yet the procedural problems are not dissociated from the merits in this case. It is respectfully submitted that the summary of the facts contained in the first paragraph of the above quoted excerpt from the opinion of the Emergency Court of Appeals can be established even if it were held that the offer was not sufficient in that regard.

But more important than these procedural difficulties is the fact that the averments contained in the complaint must be regarded as stating the facts in the case, in considering a motion to dismiss.

When that is done, then those facts show the regulations to be not generally fair and equitable.

5

On the fifth alleged error intended to be urged—that it is believed the Emergency Court of Appeals erred in failing to grant the petitioner the opportunity to amend his application for leave to introduce evidence under Section 204 (e), Rule 18 (a).

What has been said in arguing the preceding alleged errors applies to this one and makes it unnecessary, in our judgment, to argue this one separately.

CONCLUSION

In conclusion it may be observed that a dealer, like consumers, will not pay more for merchandise than economic conditions require him to pay. The proffered proof included a showing that the petitioner here, and all others in the same business, were unable to purchase below ceiling prices; that no profit whatever was possible under these regulations.

To pass the test for fairness and equitableness such regulations should provide a ceiling for dealers and a lower ceiling for the class of sellers from whom the dealer must necessarily buy for re-sale and both ceilings should be adjusted to the condition and usefulness of the appliance within such reasonable price range as would make available to the public such used appliances. No others are available, regardless of ceilings.

Respectfully submitted,

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